

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIAN NOLL

(Defendant Below)

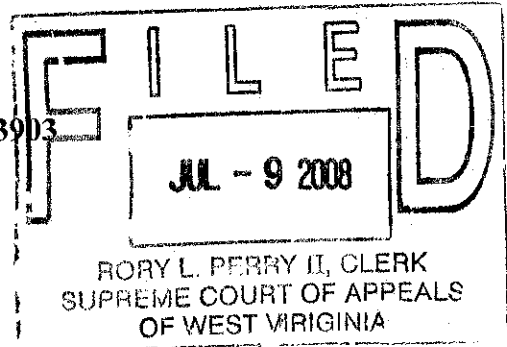
Petitioner

v.

STATE OF WEST VIRGINIA

Respondent.

Docket No. 33903



BRIAN NOLL'S REPLY BRIEF

I. MR. NOLL'S CONVICTIONS MUST BE REVERSED, DUE TO PROSECUTORIAL MISCONDUCT AND VIOLATION OF W.V.R.E. RULE 404B

Mr. Noll's convictions must be reversed, as they were based on the false impression created by the State that Mr. Noll was part of burglary ring that had been operating in Berkeley County for a least two years, involving many more burglaries than those for which he was on trial. Mr. Noll was also convicted based on the similar false impression that he was wearing a necklace that came from one of these burglaries. The State was prohibited from introducing the necklace testimony, but repeatedly did so, as set forth in Mr. Noll's Initial Appeal Brief. In addition, the State repeatedly introduced testimony about this so called burglary ring, even though no notice of intent to use this evidence was ever given.

The State now argues that that the testimony concerning the multiple burglaries is not error, because Mr. Noll had one unitary trial involving four burglaries. However, the State's testimony about the so called burglary ring went far beyond these incidents, and included attempting to introduce a photographic array containing pictures of burglarized homes other than those at issue in this case. Thus, the State attempted to paint Mr. Noll

as a bad actor, in violation of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), and without ever noticing its intent to do so.

The State now argues that it never violated the Circuit Court's Pretrial Order that prohibited testimony that the necklace came from a Morgan County burglary, because the testimony was simply that this necklace came from a burglary. However, there is nothing magic about the necklace coming from Morgan County. Rather, the issue was whether the necklace was legitimately in Mr. Noll's possession, or whether it came from a burglary. The Circuit Court specifically ruled that this evidence could not be introduced, and the State repeatedly violated this order.

The State also tries to argue that the other burglary evidence, and particularly the necklace evidence, was admissible, because it was intrinsic to Mr. Noll's alleged criminal activity. However, there is nothing intrinsic to Mr. Noll's charges that other crimes had been committed in Berkeley County, or that the necklace was from a burglary, as this evidence is not part of a single criminal episode. *State v. LaRock*, 196 W.Va. 294, 312, 470 S.E.2d 613, 631, n. 29 (1996). The mere fact that the State makes this argument now shows its continued attempt to create the same false impression made at trial, that Mr. Noll's necklace was from one of the crimes for which he was on trial. Therefore, this argument must also fail.

II. THE STATE'S COMMENTS ON MR. NOLL'S RIGHT TO REMAIN SILENT WARRANTS REVERSAL OF HIS CONVICTIONS.

Here, by eliciting testimony that defendants are never forthcoming with all the information that they know when they are questioned, and by arguing about this to the jury, the State's improperly commented on Mr. Noll's right to remain silent. This

violated *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977), *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996), and *State v. Murray*, 220 W.Va. 735, 649 S.E.2d 509 (2007), and warrants reversal of Mr. Noll's convictions.

III. THESE ERRORS ARE REVIEWABLE AS PLAIN ERROR.

Admission of this evidence is reviewable as plain error. This Court has already found that the State's comment on a defendant's pretrial silence is reviewable under this doctrine. *State v. Marple*, 197 W.Va. 47, 52, 475 S.E.2d 47 (1996).

Marple also teaches that plain error can reverse a conviction when the error seriously affects the fairness, integrity, and public reputation of the judicial process, such as when it affects the jury's verdict. *Marple* at Syllabus Points 2 and 3. This test is met here, particularly for the necklace testimony, and requires reversal of Mr. Noll's convictions.

IV. MR. NOLL'S CONVICTIONS MUST BE REVERSED, BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS.

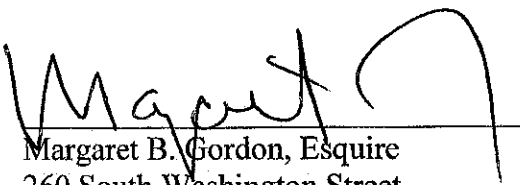
Mr. Noll reasserts here the arguments contained in his initial brief to this Court on this point. The State simply never tied its case together, that these houses and this property had been burglarized by Mr. Noll. Thus, there was insufficient evidence to support Mr. Noll's convictions.

CONCLUSION

As set forth above and in Mr. Noll's Initial Appeal Brief, Mr. Noll's convictions should be reversed by this Court.

Respectfully submitted,

BRIAN NOLL
By Counsel


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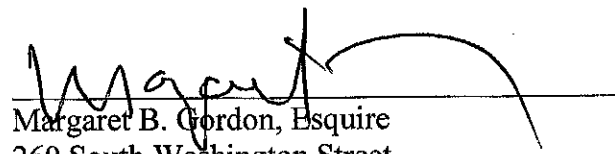
CERTIFICATE OF SERVICE

Type of Service: Unites States First-Class, Postage Prepaid Mail

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Persons Served: The Honorable Pamela Games-Neeley
Berkeley County Prosecutor
Berkeley County Judicial Center
380 West South Street
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Item Served: Brian Noll's Reply Brief


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